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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/667,958	09/22/2003	Henry Drummond Boswell	CM2632MC	1197

27752 7590 12/14/2004

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EXAMINER

ELHILO, EISA B

ART UNIT PAPER NUMBER

1751

DATE MAILED: 12/14/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/667,958

Applicant(s)

BOSWELL ET AL.

Examiner

Eisa B Elhilo

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 14 October 2004.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-3 and 5-14 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-3 and 5-14 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

### **DETAILED ACTION**

1 This action is responsive to the amendment filed on October 14, 2004.

2 The cancellation of claim 4 is acknowledged. Pending claims are 1-3 and 5-14.

3 Objection to claim 2 is withdrawn because of the applicant's amendment.

4 Claims 1-3, 5-10 and 12-14 stand rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1, 3-5, 10-22 and 26-30 of the co-pending Application No. 10/667,878 for the reasons set forth in the previous office action that mailed on July, 14, 2004.

5 Claims 1-3, 6-10 and 13 stand rejected under 35 U.S.C. 102(b) as being anticipated by or, in alternative, under 103(a) obvious over Dias et al. (US 6,004,355) for the reasons set forth in the previous office action that mailed on July, 14, 2004.

6 Claim 5 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Dias et al. (US 6, 004, 355) in view of Wenke (US 5, 100, 436) for the reasons set forth in the previous office action that mailed on July, 14, 2004.

7 Claims 11, 12 and 14 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Dias et al. (US 6, 004, 355) for the reasons set forth in the previous office action that mailed on July, 14, 2004.

### ***Response to Applicant's Arguments***

8 Applicant's arguments filed 10/14/2004 have been fully considered but they are not persuasive.

With respect to the rejection of the claims under 102(b) and/or 103(a) based upon Dias et al. (US' 355), Applicant argues that the peroxyacids that taught by Dias et al. have oxidizing aids

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in the range of 7 to 9.5 and at pH 10, the peroxyacid oxidizing aids become deprotonated and as such are weaker oxidizing agents and at pH above 8, the peroxyacid oxidizing aids are more damaging to hair than oxidizing agents such as hydrogen peroxide.

The examiner respectfully disagrees with the above arguments because Dias et al. teaches clearly that the compositions comprise an essential feature at least one water-soluble peroxygen dye oxidizing agent (a compound which can be substantially solubilized in water) such as inorganic materials capable of yielding hydrogen peroxide in an aqueous solution and these peroxygen dye oxidizing compounds are well known in the art and include hydrogen peroxide (see col. 5, lines 40-49) and wherein the composition has a pH of 10 which is within the range of the of the amended claims (see col. 32, line 65). Therefore, the claims are anticipated by or in alternative obvious over Dias et al.

With respect to the rejection of the claims based upon Dais et al. (US' 355) in view of Wenke (US' 436), Applicant argues that the combination of the references does not teach or suggest all of the applicant's claim limitations. Applicant also argues that Wenke teaches a composition in the form of an emulsion and therefore, one of the skill in the art would not be motivated to formulate the composition of Dias into an emulsion because the peroxyacid oxidizing aids of Dias, which are required components of the compositions of Dias, are difficult to solubilize, especially in an oil-in-water emulsion and, therefore, the combination of the references does not established a prima facie case of obviousness

The examiner respectfully disagrees with the above arguments for the same reasons given above and also because Dais et al. (US' 355) teaches a dyeing composition having a pH of 10 as as described above, and wherein the composition may be formulated in the emulsion form (oil-

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in-water), which implies that water is a part of the emulsion composition and, thus, there is a sufficient motivation to one having ordinary skill in the art to formulate the composition of Dais in the emulsion form in which the peroxyacid oxidizing aids can be solubilize in the water part of the emulsion. Wenke (US' 436) as a secondary reference teaches a hair dyeing composition having a pH in the range of 6 to 8.5 (dyeing hair from a lighter to a darker shade) and a dyeing composition having a pH in the range of 9 to 10 (dyeing a darker hair to a lighter shade) (see col. 6, lines 40-50). Further in both cases the pH range is either overlapped (9-10) with the claimed range (9.5 to 10) or closed (8.5) to the claimed range (9.5-10), and, thus, both references teach the limitations of the instant amended claims. Therefore, the prima facie case of obviousness has been established.

With respect to the rejection of the claims under 35 U.S.C. 103(a), based upon Dais et al. (US' 355), Applicant argues that Dias et al. does not teach or disclose the limitations of the amended claims that required a pH in the range of 9.5 to 11.

The examiner respectfully disagrees with the above arguments for the same reasons given above.

Further, the examiner advise the applicant to provide a clear data or showing to demonstrate that the claimed composition provides unexpected and an obvious results over the composition of the closest prior.

9 **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO**


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MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Eisa B Elhilo whose telephone number is (571) 272-1315. The examiner can normally be reached on M - F (8:00 -5:30) with alternate Friday off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Yogendra Gupta can be reached on (571) 272-1316. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
Eisa Elhilo  
December 9, 2004

  
MARGARET EINSMANN  
PRIMARY EXAMINER  
GROUP 1100